BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of

THE UNITED OIL COMPANY (Dissolved)

Appearances:

For Appellant: Robert E. Paradise, Attorney at Law

For Respondent : W. M. Walsh, Assistant Franchise Tax Commissioner; James J, Arditto, Franchise Tax Counsel; Crawford H. Thomas, Assistant Tax Counsel

O P I N I O N

This appeal is made pursuant to Section 25 of the Bank and Corporation Franchise Tax Act (Chapter 13, Statutes of 1929, as amended) from the action of the Franchise Tax Commissioner in overruling the protest of The United Oil Company (Dissolved) to a proposad assessment of additional tax in the amount of $4 ,146.85 for the taxable year ended December 31, 1937.

The Appellant, a domestic corporation, was completely liquidated on December 7, 1937, by a transfer of aii its assets to its stockholders and did not engage in business thereafter, On June 9, 1938, tha amount of $25 .00 was forwarded to the Commissioner in payment of the minimum tax liability under the Act for the taxable year ended December 31, 1938. At that time it was requested that a certificate be issued stating that the Appellant had been discharged of all tax liability under the Act, in order that such a certificate might accompany the final certificate of dissolution to be filed with the Secretary of State as required by Section 403(c) of the Civil Code, The Appellant was informed by the Commissioner on June 17, 1938, that payment of delinquent charges in the amount of $3.97 would be necessary for the issuance of the tax clearance certificate and such amount was remitted. On July 18, 1938, the Commissioner issued a certificate which stated that the Appellant "...is hereby discharged in full of all. Bank and Corporation Franchise taxes and delinquent charges thereon to and including December 31, 1938." The Appellant was thereafter formally dissolved on September 30, 1938. The Commissioner's notice of additional tax proposed to be assessed for the taxable year ended December 31, 3937, was mailed to the Appellant on March 5, 1941.

The questions presented herein are (1) whether, prior to the 1939 amendment of Section 29 of the Bank and Corporation Franchise Tax Act, the Commissioner's issuance of a certificate of discharge of taxes, for filing with the Secretary of Stat2 in connection with the final dissolution of a corporation, operated to relieve the corporation from further liability for taxes due under the Act, and (3) whether the proposed assessment of additional tax is barred by the statute of limitations.

The revelant provisions of Section 29 of the Bank and Corporation Franchise Tax Xct at tha date of Appellant's dissolution in 1938 were as follows:

> "No decree of dissolution shall be made and entered by any court, nor shall the county clerk of any county or tha Secretary of State file any such decree, or file any other document by which the term of existence of any taxpayer shall be reduced or terminated, nor shall the Secretary of State file any certificate of' the surrender by a foreign corporation of its right to do intrastate business in this State until the tax, penalties, and interest shall have been paid."

Furthermore, at the time Appellant sought to dissolve, it was the established administrative practice of tha Secretary of State, in accordance with the foregoing provisions, to require a Commissioner's certificate of discharge from liability for franchise taxes before accepting for filing any document terminating the existence of a corporation, and that practice was formally recognized by the Commissioner in a regulation issued on October 5, 1957. This regulation, it should be noted, did not, however, in any way purport to describe or define the force and effect of the certificate of discharge but provided merely for its issuance.

Subsequent to the dissolution of Appellant, Chapter 1050, Statutes of 1.939) amended Section 29 by omitting "until the tax, penalties, and interest shall have been paid," and by substitutting therefor

> "... unless the taxpayer obtains from the commissioner und files with said court, county clerk cr Secretary of State as the case may be, a certificate to the effect that all taxes imposed by this act upon the taxpayer which have become Payable, have bean paid, and that all taxes which may become due are secured by bond, deposit or otherwise. Within thirty days after receiving a request for a certificate, the commissioner shall either issue the certificate or notify the person requesting the certificate of the amount of tax that must be paid or the amount of the bond, deposit or other security that must be furnished as a condition of issuing the certificate. The issuance of the certificate shall not relieve the taxpayer. **or** any individual, bank, or corporation from liability for any taxes, penalties, or interest imposed by this act."

It is this amendment which provides the basis for Appellant's position with respect to the first question presented. Appellant contends that the addition of the express provision against discharge from liability by the enactment of this amendment manifested the intention of the Legislature to effect a change in the prior existing law, and, accordingly, that the issuance of the certificat to Appellant on July 18, 1938, constituted a release from liability and a bar to any subsequent assessment against it by the Commission

The invalidity of Appellant's position, however, becomes apparent when viewed in the light of the Commissioner's total lack of authority, prior to the 1939 amendment, to relieve the taxpayer from liability for taxes due, and when the fact is considered that the tax act did not than authorize the issuance of the certificate of discharge to Appellant nor provide for the issuance of any type of certificate which might constitute a bar to a subsequent assessment of tax. In fact, the only certificate of this type for which provision was made by law was that referred to in Civil Code Section 403(c), being a certificate of the directors of a corporation stating, among other things, that any tax or penalty due under the Bank and Corporation Franchise Tax Act had been paid, While the secretary of State as a matter of administrative practice required a certificate of the Commissioner, that administrative requirement cannot as a matter of law be regarded as the equivalent of a statutory provision authorizing the issuance of the certificate and expressly providing that it shall constitute a bar to any subsequent assessment of tax determined to be due by the Commissioner.

Support for this view is to be found in Wardall v. State of California, 29 A. C. 647, upholding the validity of an assessment by the administrative agency of the tax on the sale of distilled spirits imposed by the Alcoholic Beverage Control Act although the agency had previously made another deficiency assessment, which had become final, against the taxpayer for the same period. The Court pointed out that the statute levies the tax and leaves to the enforcing agency only the determination of the amount due in a particular case and the duty of collection. Here, too, the tax is imposed by the statute (Appellant does net contest its liability for the tax apart from the consideration herein considered) and it is made the duty of the enforcing agency to determine the amount due and to make collection. While the Court concluded in the Wardall case that the statute authorized the subsequent assessment, the underlying theory of the decision - that the assessment and collection of a tax levied by statute should not be barred because of action taken by the administrative agency charged with such collection and assessment - is pertinent here, and, in the absence of a statutory provision constituting a bar to the assessment and collection of the tax in question, precludes the adoption of the Appellant's position,

Appellant's reference to the 1939 amendment to Section 29 and to the authorities holding that an amendment ordinarily indicates an intent to change the pre-existing law does not require a contrary conclusion, An amendment may indicate merely an intention of the Legislature to clarify existing law and surrounding circumstances may be considered to determine the intent with which the change was made. Union League Club v. Johnson, 18 Cal. 2d 275; San Joaquin Ginning Co. v, McColgan, 20 Cal. 2d 254. Had the Tax Act prior to the 1939 amendment authorized the issuance of the certificate, but not prescribed its effect, and the amendment merely added the proviso that the certificate should not relieve the taxpayer from any liability imposed by the Act, there might well have been some force in Appellant's contention. That amendment, however, not only added that proviso, but for the first time

authorized the issuance of certificates which the Commissioner had previously been issuing as a matter of administrative practice only and without any authority whatsoever to discharge taxpayers from tax liability. Under Appellant's theory that a change in the pre-existing law was intended, it would, accordingly, follow that the Commissioner was not authorized to issue any sort of certificate prior to 1939, a conclusion which does not warrant upholding the Appellant's position.

The Appellant also contended that the proposed assessment was not issued by the Commissioner within the time required by law, it being its view that the three year period of limitation in effect under Section 25 of the Act at the time the tax accrued was to be applied rather than the four-year period substituted by Chapter 1050, Statutes of 1939. The factual situation presented here, however, is identical with that involved in Edison California Stores, Inc., v. McColgan, 30 A.C. 472, wherein the four-year period was held applicable.

O R D E R

Pursuant to the views expressed in the opinion of the Board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the action of Chas. J. McColgan, Franchise Tax Commissioner, in overruling the protest of the United Oil Company (Dissolved) to a proposed assessment of additional tax in the amount of $4,146.85 for the taxable year ended December 31, 1937, pursuant to Chapter 13, Statutes of 1925, as amended, be and the same is hereby sustained.

Done at Sacramento, California, this 11th day of December, 1947, by the State Board of Equalization.

Wm. G. Bonelli, Chairman
Geo. R. Reilly, Member
J. H. Quinn, Member
Jerrold L. Seawell, Member

ATTEST: Dixwell I. Pierce, Secretary